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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 135

PAUL R. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 223

LEO B. MITTELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (J. Pet. App. A; 3 R. 136a–146a) [1] is reported at 374 F. 2d 414.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1967 (3 R. 147a–148a). Petitions for rehear-

[1] "J. Pet." refers to Jones' petition for a writ of certiorari, "M. Pet." to Mittelman's. The printed record is in three volumes ("R." preceded by the volume number), consisting of the appendices to the briefs in the court of appeals and the proceedings in that court. "Tr." refers to the original transcript of record.

ing (3 R. 149a–157a, 158a-187a) and a supplemental petition by petitioner Jones for rehearing (3 R. 201a–215a) were denied on April 6, 1967 (3 R. 227a–228a). Jones' petition for a writ of certiorari was filed on May 5, 1967. On April 21, 1967, Mr. Justice Harlan extended petitioner Mittelman's time within which to file a petition for a writ of certiorari to and including June 6, 1967, and his petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administration of the oaths which petitioners took in executing their affidavits, later filed by petitioner Mittelman in support of a motion for a new trial in a federal criminal case to which he was a party, were authorized by a "law of the United States" within the meaning of that term as used in the federal perjury statute.

2. Whether petitioners, each of whom was charged in a separate count with making a perjurious affidavit, which one of the two later filed in support of a motion for a new trial in a criminal case involving him, were properly joined as defendants in a single indictment.

3. Whether petitioner Jones was entitled to a severance because a portion of the evidence, the grand jury testimony of petitioner Mittelman, was admissible only as against Mittelman.

4. Whether the instruction to the jury that it could consider the allegedly perjurious affidavit of each petitioner against the other if it found that the affidavits had been executed pursuant to a joint undertaking to secure a new trial for petitioner Mittelman was correct.

5. Whether the trial court erred in admitting, without objection, the grand jury testimony of petitioner Jones, given pursuant to subpoena after he had been advised of his right not to incriminate himself.

6. Whether petitioner Jones' conviction is supported by the evidence.

7. Whether petitioner Jones' right to a speedy trial was violated, it appearing that he at no time demanded to be tried during the three-year period between the return of the indictment and the calling of the case for trial, and that, when the case was called, his attorney expressly declined to move to dismiss the indictment by reason of the delay now complained of.

8. Whether the statement in petitioner Mittelman's affidavit, which the indictment charged to be perjurious, was material to the motion in support of which it was offered.

9. Whether petitioner Mittelman's trial was unfair because the indictment referred to his conviction out of which the perjury charges arose.

STATUTES AND RULES INVOLVED

The federal perjury statute, 18 U.S.C. 1621, provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, ex-

cept as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. * * *

The Act of July 3, 1926, 44 Stat. 830, 5 U.S.C. 92a, provides in pertinent part:

> In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States * * *

The Federal Rules of Criminal Procedure provide in pertinent part:

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

* * * * *

(b) *Joinder of Defendants.*

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * * * * *

Rule 47. Motions

> An application to the court for an order shall be by motion. * * * It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of perjury, in violation of 18 U.S.C. 1621 (*supra*), for submitting false affidavits in support of a motion by petitioner Mittelman for a new trial in a criminal case involving him and others (1 R. 2a–6a; Tr. 1–590). On October 3, 1966, each petitioner was sentenced to 18 months' imprisonment, the judgment specifying that he was to be eligible for parole, pursuant to 18 U.S.C. 4208(a)(2), at such time as the Board of Parole should deem appropriate (1 R. 7a; Tr. 842, 843). The court of appeals affirmed (J. Pet. App. A).

The pertinent facts are as follows:

In 1960, petitioner Mittelman and others were convicted in the district court of mail fraud and conspiracy to sell unregistered securities. Mittelman's conviction was affirmed on August 22, 1961. *United States* v. *Crosby et al.*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Petitioner Jones, whom the indictment in the earlier proceeding had named as a co-conspirator, had been in New York under government subpoena during part of that trial but had not been called as a

witness either by the government or by any defendant (Tr. 669–670, 702–703).

On May 15, 1962, petitioner Mittelman filed in the district court a motion for a new trial on the ground of alleged newly discovered evidence and alleged suppression by the government of evidence favorable to him (Tr. 633–634).[2] In support of that motion Mittelman filed two affidavits (3 R. 46a–47a, 50a–51a)—one by petitioner Jones, sworn to April 2, 1962 (Tr. 702–707; M. Pet. App. 18a–23a), and one by Mittelman, executed May 15, 1962 (Tr. 635–675; M. Pet. App. 1a–17a). The present prosecution is based on allegedly perjurious statements contained in the two affidavits.

Jones attested in his affidavit that two of the government witnesses at the mail fraud trial, Robert Holland and Howard Carroll, had given false testimony against Mittelman (Tr. 702–706; M. Pet. App. 18a–22a). Mittelman stated in his affidavit that he had always known that if Jones told the truth Jones could prove that Holland and Carroll had lied (Tr. 670; M. Pet. 15). In the assertedly perjurious portion of his affidavit, Mittelman sought to excuse his failure to elicit such proof, through Jones, at his trial. He swore in relevant part (1 R. 6a; Tr. 670; M. Pet. 15):

> * * * Before I could make up my mind whether to issue a subpoena [for Jones], or depend on his being called by the prosecutor,

[2] The motion invoked both Rule 33 of the Federal Rules of Criminal Procedure (p. 4, *supra*) and 28 U.S.C. 2255.

> he was suddenly excused just before the defense was to begin, and he was not to be located.

Jones, in the allegedly false passage of his affidavit, corroborated Mittelman as to Jones' unavailability to Mittelman as a witness during the period in the mail fraud trial when the defense was presenting its evidence. He attested in relevant part (1 R. 4a–5a; Tr. 702–703; M. Pet. App. 19a):

> 4. * * * I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.
>
> 5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started travelling [to Texas by way of Maryland, Washington, D.C., and North Carolina]. * * * This travelling * * * took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittelman or any of the other defendants in the instant case.

The perjury indictment (1 R. 2a–6a) was in two counts—the first involving Jones' affidavit and the second, Mittelman's. It was charged that the quoted portions of the affidavits were false in that Jones and Mittelman had met and conferred on May 4, 1960,

after the government had rested its case in the mail fraud trial, and that Jones had thereafter remained in New York City at least until May 6, 1960, at which time the defense was presenting its evidence (1 R. 5a, 6a).

The evidence adduced by the government in support of these allegations may be summarized as follows:

The government rested its case in chief in the mail fraud trial on May 2, 1960; defense motions were made and argued on May 3; there were no proceedings on May 4; and the defense began putting in its evidence on May 5 (3 R. 23a–24a, 52a–53a). On the evening of May 4, Mittelman, Jones, Mittelman's attorney in the mail fraud trial (a Mr. Garlock), Harris Steinberg (the attorney for a co-defendant of Mittelman's), and a number of other attorneys and defendants involved met and conferred in a suite of the Royalton Hotel in New York City, which Mittelman had engaged for the purpose (3 R. 24a–30a, 32a–33a, 41a–45a). Mittelman's purpose in arranging the meeting was to give the defense attorneys in attendance an opportunity to meet Jones, to hear his proposed testimony, and to decide, "in a cooperative spirit," whether it would be wise to call him (3 R. 42a–45a). Mittelman had told Steinberg prior to the meeting that he thought Jones should be called, but that he desired to get the attorneys' views on the matter (3 R. 42a, 45a). After seeing and listening to Jones, Steinberg told Mittelman that in his view Jones should not be called (3 R. 43a).

A check payable to "Cash" in the amount of $300, drawn by Mittelman on his account in a New York

City bank on May 6, 1960, and bearing on its face the handwritten words "Jones-Expense," was cashed by the bank on that date (2 R. 58; 3 R. 18a–20a; G. Ex. 8, Tr. 74; Tr. 76).

The affidavit of Jones containing the allegedly perjurious statements was entitled "Affidavit of Paul R. Jones in support of Leo B. Mittelman's motion for a new trial under Rule 33." One of its introductory paragraphs read: "I am making this affidavit at the request of Leo B. Mittelman and I have been advised that he intends to use it in connection with a motion for a new trial" (3 R. 51a, 99a; Tr. 702; M. Pet. App. 18a). Jones read the affidavit, which had been drawn up in the office of Mittelman's attorney, before signing and swearing to it. The oath was administered to Jones by the attorney's secretary, a notary public licensed by the State of New York (3 R. 47a–51a).

Both petitioners testified before the grand jury which later indicted them (2 R. 10–28, 30–52). Mittelman appeared at his own request (2 R. 10). Jones, who appeared pursuant to subpoena, consulted Mittelman's attorney the day prior to his appearance (2 R. 30–31). Both petitioners were advised at the outset of their testimony of their privilege not to incriminate themselves (2 R. 10, 30). The testimony of each was received in evidence at the trial—limited, in each instance to the defendant whose testimony it was (3 R. 115a; Tr. 279, 327, 337, 359).

Jones testified before the grand jury that he discussed the contents of his affidavit with Mittelman and Mittelman's attorney in the latter's office on the day before he executed it. Mittelman and the attorney

had asked him to subscribe to an affidavit stating that government witnesses Holland and Carroll had lied at the mail fraud trial and that it would have been impossible for the defense to locate Jones after he left New York for the last time, while the trial was still in progress (2 R. 38). There had been, Jones testified, no discussion about putting into the affidavit the matter of the meeting with defense counsel at the Royalton Hotel or of the fact that Jones had been in New York while the defense case was in progress (2 R. 38–39). Jones further testified that he pointed out to Mittelman and the attorney that the defense at the mail fraud trial could have called him as a witness if it had wished to but that it had decided not to (2 R. 40–41).

Mittelman testified before the grand jury that he personally prepared the first draft of Jones' affidavit and that he and his attorney reviewed it with Jones before the final version was prepared (2 R. 26–27). Jones, on hearing the draft which Mittelman had composed, insisted, according to Mittelman, that the attorney change the text of paragraphs 4 and 5 to the phraseology which appeared in the affidavit as finally submitted (p. 7, *supra*) (2 R. 18–19). Because Mittelman had recalled the meeting at the Royalton Hotel, he testified, he had expressed doubt to Jones and the attorney as to whether the paragraphs as finally drafted were right in their "chronology." But when Jones insisted that his recollection of the chronology was correct, Mittelman said, he made no further objection (2 R. 16–19). Mittelman acknowledged that he wrote the May 6 check for $300 (pp. 8–9, *supra*) and

that its purpose was to reimburse Jones for the latter's expenses in coming to New York to attend the May 4 meeting at Royalton Hotel (2 R. 13, 23–24).

ARGUMENT

1. Petitioners contend that they did not violate the federal perjury statute (p. 3, *supra*) because no "law of the United States" authorized the administration of the oaths which they took (J. Pet. 10–14). The contention, which was raised for the first time in petitioner Jones' supplemental petition for rehearing in the court of appeals (3 R. 203a–207a) and which petitioner Mittelman (who has never previously urged it) adopts by reference (M. Pet. 3, 25), is without merit. Petitioners' affidavits were filed in the district court by Mittelman in support of his motion for a new trial. Jones was aware, when he executed his affidavit, that Mittelman planned to use it for this purpose. P. 9, *supra*. The motion was filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure (p. 4, *supra*), authorizing the granting of a motion for a new trial on the ground of newly discovered evidence. The affidavits were filed pursuant to Rule 47 (p. 5, *supra*), authorizing the supporting of any motion "by affidavit." These Rules are laws of the United States within the meaning of the perjury statute. *United States* v. *Hvass*, 355 U.S. 570. As the Court there observed, a "law of the United States," as that term is used in the perjury statute, "is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base." 355 U.S. at 575. The Federal Rules of Criminal

Procedure have far more than a "clear legislative base." Adopted by this Court pursuant to express statutory authority, 18 U.S.C. 3771 and 3772, they have the force and effect of law.

It is immaterial that Jones' oath was administered by a State notary public.[8] Federal law expressly provides that in all cases in which, under the laws of the United States, oaths are authorized to be administered, they may be administered by notaries public duly appointed in any State. Act of July 3, 1926, 44 Stat. 830, 5 U.S.C. 93a (p. 4, *supra*).

2. There is no merit to petitioners' contention (J. Pet. 17–18; M. Pet. 42–43) that the indictment misjoined them as defendants. Rule 8(b) of the Federal Rules of Criminal Procedure (p. 4, *supra*) authorizes joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The indictment at bar fully complied with this Rule.

The perjuries involved were manifestly intimately related. Each involved the same basic misrepresentation of fact and each had the same objective—the obtaining of a new trial for petitioner Mittelman. It appeared from the face of Jones' affidavit that it had been given to support Mittelman's motion and both petitioners acknowledged before the grand jury that they had collaborated closely in its preparation (pp.

[8] Mittelman's oath was administered by a federal parole officer (3 R. 46a–47a; Tr. 223–224, 675). Such officers have explicit federal statutory authority to administer oaths. 18 U.S.C. 4004.

9–10, *supra*). That Mittelman's affidavit was executed after that of Jones and in Jones' absence is immaterial. In view of the substantial identity of the allegedly perjurious representations, the collaboration by petitioners in Jones' affidavit, and the common objective of each, the perjuries charged, within the fair intendment of Rule 8(b), were part of the "same series of acts or transactions constituting an offense or offenses." Cf. *Application of Gottesman*, 332 F. 2d 975 (C.A. 2); *United States* v. *Hoffa*, 349 F. 2d 20, 42–43 (C.A. 6), affirmed on other issues, 385 U.S. 293; *Wiley* v. *United States*, 277 F. 2d 820, 824 (C.A. 4), certiorari denied, 364 U.S. 817; *Kivette* v. *United States*, 230 F. 2d 749, 753 (C.A. 5), certiorari denied, 355 U.S. 935; *Scheve* v. *United States*, 184 F. 2d 695 (C.A.D.C.).

Rule 8(b) is explicit that the defendants "may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." Thus the fact that each count charged one of the petitioners alone is immaterial.[4]

3. Petitioner Jones contends that, if it be assumed that his joinder with Mittelman was authorized by Rule 8(b) in the first instance, his joint trial with

[4] Petitioner Jones' reliance on *McElroy* v. *United States*, 164 U.S. 76 (J. Pet. 18) is misplaced. The offenses there involved were "in nowise parts of the same transaction" (164 U.S. at 81). *Metheany* v. *United States*, 365 F. 2d 90, 94, n. 4 (C.A. 9), which Jones also cites (J. Pet. 18), merely cites the general rule that each count of the indictment, for joinder to be proper, must have arisen out of the same series of transactions in which all of the defendants participated. For the reasons we have stated, there was no departure from this rule in this case.

Mittelman was nevertheless prejudicial in the particular circumstances of this case—with the consequence, he urges, that his motion for severance under Rule 14 (J. Pet. App. B 15a), made prior to and renewed during the trial (Tr. 773–774; 2 R. 8–9, 29), was erroneously denied (J. Pet. 24–27).[5] The prejudice stemmed, it is said, from the fact that Mittelman's grand jury testimony—which was admissible only as against Mittelman—contained statements incriminatory of Jones which the jury (it is argued) must have used against Jones as well (J. Pet. 25–27). The contention is without merit.

The granting or denial of a severance rests in the sound discretion of the trial court. *Schaffer* v. *United States,* 362 U.S. 511, 514–516; *Delli Paoli* v. *United States,* 352 U.S. 232, 243; *Opper* v. *United States,* 348 U.S. 84, 95. There was no abuse here. Even where the evidence which assertedly requires severance is a confession, implicating by name a defendant against whom it is not admissible, there is no absolute requirement of separate trials. *Delli Paoli* v. *United States, supra,* 352 U.S. at 236–243; cf. *Opper* v. *United States, supra,* 348 U.S. at 94–95. Here the grand jury testimony of each petitioner was basically exculpatory in its tenor and intent (although each contained admissions which, viewed with the other evidence in the case, the jury found sufficient to warrant conviction). The trial court carefully and repeatedly instructed the jury to consider the testimony of each only as

[5] Petitioner Mittelman seeks to adopt this contention (M. Pet. 42–44). It is, however, not available to him, as he at no time moved for a severance.

against the indivdual who gave it (3 R. 115a; Tr. 279, 327, 337, 359). Here, as in *Delli Paoli*, there was no "mass trial" or "multiplicity of evidentiary restrictions" (352 U.S. at 241). Only petitioners were on trial, the issues were simple, and there is no reason to suppose that the jury had difficulty in following the court's instructions.

Jones' contention that the jury must have used Mittelman's testimony against him because without it the jury had no basis for concluding that the allegedly perjurious statements in Jones' affidavit had been made with criminal intent (J. Pet. 26–27) is unsound. Jones' intent could have been inferred from—*inter alia*—his own acknowledgement to the grand jury that he pointed out to Mittelman and Mittelman's lawyer, in the course of the preparation of his affidavit, that Mittelman could have called him as a witness at the mail fraud trial if he had wished to but that he had decided not to (2 R. 40–41). It was, of course, precisely the omission of this critical information from both affidavits which resulted in their being materially false and misleading.

4. Petitioner Jones contends (J. Pet. 19–22) that the decision of the court of appeals "permits a wider scope of admissibility of evidence in prosecutions of defendants charged separately and independently in one indictment than if they were charged with conspiracy, joint action, or aiding and abetting" and thus "presents dangers even greater than those in conspiracy prosecutions" (J. Pet. 19).[6] He relies (see

[6] Petitioner Mittelman adopts the contention by reference (M. Pet. 3, 25, 43).

ibid.) on the fact that the trial court instructed the jury (3 R. 115a–116a) that it could consider the affidavit of each petitioner against the other if it found that the affidavits had been executed pursuant to a "common agreement or undertaking to secure a new trial" for Mittelman. He argues that under this instruction there need be "only an agreement to commit a legal act by legal means" to make a defendant's declarations admissible against a codefendant (J. Pet. 20) and that the court of appeals "approv[ed]" the instruction (J. Pet. 21).

In the first place, the instruction referred to was not "approved" by the court of appeals. The court of appeals had no occasion to consider the instruction because neither it nor any other was challenged in that court.[7]

Secondly, the challenge here made to the instruction is foreclosed by Rule 30 of the Federal Rules of Criminal Procedure. For, while Jones objected to the instruction at the trial, he did so on a ground altogether different from that now urged. The criticism of the instruction which he now makes is that it permitted the jury to consider each petitioner's affidavit against the other if it found a "mere legal" agreement

[7] The statement in the court of appeals' opinion to which Jones refers as approving the instruction (J. Pet. 19)—that "[t]here need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each other" (J. Pet. App. A 7a)—was made in explanation of the court's holding that the joint trial of petitioners had not been prejudicial. The statement had no relation to the instruction now challenged or to any other.

on the part of the petitioners to seek a new trial for Mittelman (J. Pet. 19, 20, 21). At the trial he challenged the instruction only on the ground that the indictment *did not allege* any agreement or joint undertaking (2 R. 56–57). Rule 30 is explicit that no portion of the instructions may be assigned as error unless objection thereto (including "the grounds" thereof) is distinctly articulated before the jury retires to deliberate.

In all events, the instruction was correct in substance. It is well settled that statements made by each conspirator during the existence of the conspiracy, and in furtherance of its ends, are admissible against all (*e.g., Delli Paoli* v. *United States,* 352 U.S. 232, 237; *Lutwak* v. *United States,* 344 U.S. 604, 617; *Fiswick* v. *United States,* 329 U.S. 211, 217) and that there need be no charge of conspiracy for this principle to be applicable—it being enough that the evidence discloses one. *St. Clair* v. *United States,* 154 U.S. 134, 149; *United States* v. *Annunziato,* 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Pugliese,* 153 F. 2d 497, 500 (C.A. 2).[8] It is

[8] Where the conspirator whose statement is in issue is a codefendant who chooses not to take the witness stand, the defendant against whom the statement is received is of course unable to cross-examine its maker (see J. Pet. 22–23). This, however, is a commonplace of joint trials in which the evidence shows conspiracy (whether or not conspiracy is alleged) and has never been thought to present a problem under the confrontation requirement of the Sixth Amendment. The situation would not be different if separate trials were granted; the maker of the statement, if subpoenaed to testify by the defendant against whom the statement was offered, could decline to testify (invoking his privilege against self-incrimination) as readily as he

clear from the context in which the challenged instruction was given that the court, in referring to a "common agreement or undertaking to secure a new trial" for Mittelman, was referring to an improper agreement to achieve that end—through deception of the court. See, particularly, 3 R. 98a–102a. The instruction, indeed, was more favorable to petitioners than they had a right to demand. See *United States* v. *Dennis,* 183 F. 2d 201, 231 (C.A. 2), affirmed on other issues, 341 U.S. 494: "[T]he better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent." Accord, *Carbo* v. *United States,* 314 F. 2d 718, 735–738 (C.A. 9), certiorari denied, 377 U.S. 953.

5. Petitioner Jones contends that it was error for the trial court to admit his grand jury testimony in evidence against him because he appeared before the grand jury pursuant to subpoena and was a potential defendant. His testimony was thus obtained through

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can elect not to take the witness stand when on trial himself. *Pointer* v. *Texas,* 380 U.S. 400, relied on by petitioner Jones (J. Pet. 22), is not in point. The Court there condemned, as violative of the confrontation clause, a State's attempt to use at a robbery trial a transcript of the complaining witness' testimony at a preliminary hearing, at which the accused, unrepresented by counsel, had failed to exercise his right of cross-examination. The Court carefully limited its holding to situations of the type before it (380 U.S. at 407).

"a form of compulsion," he says, and for that reason ought not have been received at the trial (J. Pet. 14–15).[9]

We note, in the first place, that this issue was not raised at the trial or, indeed, at any stage of the proceedings in the district court. The point was first urged, as Jones acknowledges (J. Pet. 15), in his supplemental petition for rehearing in the court of appeals (3 R. 211a–213a). Not having been seasonably presented, it need not now be considered. Cf. *United States* v. *Bell,* 351 F. 2d 868, 874 (C.A. 6), certiorari denied, 383 U.S. 947. Moreover, the contention is clearly untenable.

The constitutional prohibition against compulsory self-incrimination does not preclude a grand jury from subpoenaing one who may appear to it, from other evidence before it, to have committed an offense germane to the jury's inquiry. Subject to the right of the witness to assert his privilege in response to specific questions, a grand jury is not prohibited from making pertinent inquiries of one who, being himself a subject of the investigation, is a potential defendant. *Kitchell* v. *United States,* 354 F. 2d 715, 720 (C.A. 1), certiorari denied, 384 U.S. 1011; *United States* v. *Bell,* 351 F. 2d 868, 874 (C.A. 6), certiorari denied, 383 U.S. 947; *United States* v. *Winter,* 348 F. 2d 204, 206–208 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Annunziato,* 293 F. 2d 373, 376 (C.A.

[9] Although petitioner Mittelman seeks to adopt by reference all of petitioner Jones' contentions (M. Pet. 3, 25), it is clear that this contention is not available to Mittelman, who appeared before the grand jury at his own request (2 R. 10).

2), certiorari denied, 368 U.S. 919; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Klein*, 247 F. 2d 908, 920–921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. The grand jury would be "denude[d] * * * of a substantial right of inquiry" if it were prevented from summoning one whom others have accused of crime to inquire what he has to say about the matter before deciding whether to return a true bill. *United States* v. *Winter, supra*, 348 F. 2d at 207–208. Jones was fully advised at the commencement of his grand jury testimony of his right not to incriminate himself (2 R. 30). As he acknowledged at the time, moreover, he had consulted with an attorney (Mittelman's) on the afternoon preceding his appearance (2 R. 30–31). His rights were thus fully protected.[10]

6. Contrary to petitioner Jones' contention (J. Pet. 27–29), his conviction was amply supported by the evidence. The government established that Jones and Mittelman attended a conference at the Royalton on the night of May 4, 1960, two days after the prosecution had rested its case in the mail fraud trial and just prior to the commencement of the defense's case on May 5. A purpose of the meeting was to decide whether Mittelman should call Jones as a defense

[10] *Garrity* v. *New Jersey*, 385 U.S. 493, cited at J. Pet. 14, is inapposite. That case involved potentially incriminatory interrogatories which police officers, in a State inquiry into ticket-fixing, were required to answer under pain of forfeiting their jobs. No such "form of compulsion" (385 U.S. at 497) is involved here.

witness and the decision was made that he would not. Jones' statement in his affidavit that he left New York on a three-week trip "just before the government rested its case" was therefore false.[11] Its plain purpose was to give support and corroboration to Mittelman's false claim that Jones' testimony, which he was tendering in support of his motion for a new trial, had been unavailable to him during the critical period of the trial (when the defense was putting in its evidence)—and hence that this indispensable prerequisite to the granting of a new trial on the ground of newly discovered evidence was present in this case. Jones admitted to the grand jury, moreover, that he had collaborated with Mittelman in the preparation of his (Jones') affidavit and that he had pointed out to Mittelman at that time that Mittelman could have called him as a witness if he had wished to but that he had decided not to. The petit jury thus had more than am-

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[11] As Jones notes (J. Pet. 27), the government rested twice in the mail fraud prosecution—once on May 2 (following the presentation of its case in chief) and again on May 12 (following completion of the defense's case) (2 R. 54; 3 R. 52a–53a). It is manifest from the context, however, that Jones, in the allegedly false passage of his affidavit, intended to refer to the government's resting in chief. Otherwise the critical paragraphs of his affidavit (4 and 5, see p. 7, *supra*) would have been pointless. (Their evident point was that, because of Jones' inaccessibility to Mittelman during Jones' three-week trip, Mittelman could not have located Jones in time to call him as a witness during the period in the trial in which the defense was putting in its evidence.) There is, thus, no substance to Jones' argument that the indictment was fatally ambiguous as to him for failing to allege "which resting the affidavit referred to" (J. Pet. 27). At all events, the alleged ambiguity in the indictment is raised for the first time in this Court. Since Jones at no time sought dismissal of the indictment on this ground, he is foreclosed from raising the issue now.

ple grounds for concluding that Jones' untrue statement had been willfully made.

7. There is no substance to petitioner Jones' contention that his right to a speedy trial was violated (J. Pet. 16). At no time prior to trial, which occurred three and a half years after the return of the indictment did Jones raise any objection to the delay.[12] On the contrary, when the case was called, Jones, through his attorney, expressly declined to move to dismiss on this ground (Tr. 777, 823, 824–825). The instant contention, as Jones acknowledges, was first made in his supplemental petition for rehearing in the court of appeals (3 R. 202a–203a). The right to a speedy trial is a personal one which is deemed waived by failure to assert it. *United States* v. *Sanchez*, 361 F. 2d 824, 825 (C.A. 2; *Mack* v. *United States*, 326 F. 2d 481, 486–487 (C.A. 8), certiorari denied, 377 U.S. 947; *United States* v. *Lustman*, 258 F. 2d 475, 478 (C.A. 2), certiorari denied, 358 U.S. 880; *Campodonico* v. *United States*, 222 F. 2d 310, 316 (C.A. 9), certiorari denied, 350 U.S. 831; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648. Even if it be true, therefore, as Jones alleged in his affidavit in support of his supplemental petition (3 R. 216a–219a), that unidentified "Internal Revenue authorities," some time between his indictment and trial, mistakenly advised him that the case against him had been dismissed (3 R. 218a), the fact would be immaterial. It would still have been incumbent on him, upon learning that his informants had been in error,

[12] The record does not indicate the reason for the delay—other than that Mittelman was incarcerated under his mail fraud sentence during the interval.

to seek dismissal for laches if he desired to rely on this ground. *Klopfer* v. *North Carolina*, 386 U.S. 213, cited by Jones, is inapposite. The North Carolina procedural device ("*nolle prosequi* with leave") which the Court there held violative of the accused's right to a speedy trial had been employed by the State over the defendant's vigorous and persistent opposition (386 U.S. at 217–218).[13]

8. Petitioner Mittelman contends that the perjurious statement in his affidavit (pp. 6–7, *supra*) was not material to the motion in support of which it was offered (M. Pet. 25–33, 45–47). The argument has two facets, neither meritorious.

a. It makes no difference, as the court of appeals observed (J. Pet. App. A 9a), whether the "main thrust" of the motion for a new trial was simply that Jones, the witness whom Mittelman was tendering to the district court as the source of the newly discovered evidence, would establish that government witnesses Carroll and Holland had lied at the mail fraud trial or that Jones would prove in addition (by attesting that he had so advised the prosecutor during the mail fraud trial) that the government had know-

[13] Unlike Jones, petitioner Mittelman (who adopts all of Jones' contentions, see M. Pet. 3, 25) did move, when the perjury case was called for trial, to dismiss the indictment because of the substantial time lapse since the return of the indictment (Tr. 747–771). However, since Mittelman, like Jones, had made no effort to compel an early trial during the three-year period when the case lay dormant, he must be presumed, like Jones, to have acquiesced in the delay. See authorities cited in the text, *supra*. At all events, Mittelman failed to pursue this issue in the court of appeals. For both these reasons the issue is as unavailable to him at this time as it is to Jones.

ingly used their allegedly tainted testimony (M. Pet. 25–33). The plain purport of the statement of Mittelman's charged by the government to have been false was that Jones had been unavailable to him during the critical period of the mail fraud trial—when the defense was presenting its evidence ("* * * he was suddenly excused just before the defense was to begin, and he was not to be located"). This representation was needed to comply with the requirement that newly discovered evidence, to afford grounds for a new trial, must appear not to have been seasonably discoverable through the exercise of reasonable diligence (*e.g.*, *United States* v. *Abrams*, 357 F. 2d 539, 550 (C.A. 2), certiorari denied, 384 U.S. 1001). The statement was therefore plainly material; for whatever may have been the full tenor of the proffered testimony, it was vital to the success of the motion to show that Mittelman had not been dilatory in discovering the new evidence he was relying on.

b. In a passage of his affidavit occurring after the statement charged to have been perjurious, Mittelman acknowledged that (M. Pet. 16)

> * * * from a strict and narrow point of view it might be argued that I had an opportunity to call Jones as my witness * * *.

He argues that the representation charged to have been false was not material in consequence of this "concession" (M. Pet. 45–47). In the first place, however, there was no outright "concession" of the sort which the present contention implies. All that Mittelman conceded was that "it might be argued that" he had had an opportunity to call Jones as his witness—and even

this "argu[ment]," he implied, ought to fail because it proceeded from a "strict and narrow point of view." More important, the quoted "concession" was at most an acknowledgement that Mittelman had had the opportunity, *during the government's presentation of its case*, to place Jones under subpoena—for use when the defense's presentation would get under way. The statement found by the jury to be perjurious, on the other hand, related precisely to that subsequent period.

9. There is no merit to petitioner Mittelman's contention (M. Pet. 37–41) that his trial was unfair because the indictment referred to his mail fraud conviction, out of which the perjury charges arose. The fact is that the portions of the indictment in which the mail fraud conviction was referred to (1 R. 2a–3a) were withheld from the jury pursuant to a *sua sponte* ruling of the trial judge (Tr. 13–14, 20–21, 35–42, 853–861). As the opinion below points out, moreover, the judge went to "extraordinary lengths" in an effort to keep knowledge of the mail fraud conviction from the jury (J. Pet. App. A 8a). The jury was informed that the perjury charges arose out of a prior judicial proceeding to which Mittelman was a party. But it was never apprised of the criminal nature of this prior proceeding (see, *e.g.*, Tr. 41, 245–246, 247, 250–251, 253–255, 257–259, 261–262, 853–855). The only substantial indication which the jury had that the earlier proceeding had been a criminal trial was the fact that Mittelman himself, in the portion of his affidavit which was charged to be perjurious (and which thus, unavoidably, came to the jury's at-

tention), had used the words "prosecutor" and "prosecutors" (1 R. 6a; see Tr. 45, 46–47, 505–506, 859–860).

As the court of appeals noted (J. Pet. App. A 8a–9a), the trial judge's rulings in this connection were more favorable to Mittelman than the rules of evidence required. For the fact of Mittelman's mail fraud conviction was plainly germane to the perjury trial—to show the strong motive Mittelman had for making a false affidavit (and collaborating with Jones in the latter's). It is well settled that evidence that is otherwise relevant is not inadmissible merely because it shows that the accused committed a crime other than that for which he is on trial. Evidence of another crime is barred only if introduced solely for the purpose of showing that the defendant is a person of criminal character. See, *e.g.*, *United States* v. *Bozza*, 365 F. 2d 206, 213 (C.A. 2), and the authorities therein cited.[14]

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[14] There is plainly no substance to Mittelman's only remaining contention (M. Pet. 34–37) (which he makes for the first time in this Court)—that the representation in his affidavit which the jury found to be perjurious did not constitute perjury because it merely "summarize[d] and characterize[d]" Jones' affidavit (which, he says, since it was "attached to the motion papers," was "independently evalua[ble]") (M. Pet. 34). While the paragraph in Mittelman's affidavit which contained the allegedly perjurious matter was captioned "*The Jones affidavit*" (1 R. 5a–6a), it is not true that Mittelman's affidavit did no more than summarize and characterize Jones'. The representations which it contained were and purported to be his own.

CONCLUSION

For the reasons stated the petitions for writs of certiorari should be denied.

Respectfully submitted.

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